

Repudiating the Holmesian “Bad Man” through Contextual Ethical Reasoning: The Lawyer As Steward*

Keith R. Fisher**

This year marks the centennial of the American Bar Association’s *Canons of Professional Ethics*.¹ Only a few years before the call for the *Canons* by ABA President Henry St. George Tucker², and a mere 11 years before their adoption, Oliver Wendell Holmes, Jr. penned what Judge Richard Posner believes “may be the best article-length work on law ever written,”³ the famous address⁴ *The Path of the Law*.⁵

*Copyright © 2007-2008 by Keith R. Fisher. All Rights Reserved.

**A.B. Princeton University, J.D. Georgetown University. Visiting Professor of Law, Northeastern University School of Law.

1. 33 A.B.A. Rep. 55-86 (1908) [hereinafter the “*Canons*”].

2. Tucker (known as Harry) was a former Attorney General of the Commonwealth of Virginia and a three-term U.S. Congressman (during which time he chaired the House Judiciary Committee for four years) who subsequently served as Professor of Law at, and later as Dean of, Washington & Lee University Law School. When not chosen as President of the University (after having served as Acting President), he left it in 1902. See Washington & Lee University School of Law, Henry St. George Tucker, available at <http://www.law.wlu.edu/faculty/history/tuckerhs.asp> (last visited Dec. 28, 2007). The scion of a family of distinguished Virginia lawyers (his eponymous grandfather was a judge, congressman, cavalry captain during the War of 1812, President of the Court of Appeals of Virginia, and law professor at the University of Virginia—see BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, 1774-PRESENT, available at <http://www.bioguide.congress.gov/scripts/biodisplay.pl?index=T000398> (last visited Dec. 28, 2007)—and his father, John Randolph Tucker, founded the Washington & Lee University Law School), Tucker was (along with his father) co-author of a distinguished treatise on constitutional law. JOHN RANDOLPH TUCKER & HENRY ST. GEORGE TUCKER, THE CONSTITUTION OF THE UNITED STATES: A CRITICAL DISCUSSION OF ITS GENESIS, DEVELOPMENT, AND INTERPRETATION (1899). For all his professional attainments, he was obviously a privileged product of his times, who opposed amending the Constitution to allow women the vote, as argued by the title essay in a collection (originally entitled “Local Self-Government”) of lectures Tucker delivered at the Yale Law School. HENRY ST. GEORGE TUCKER, WOMEN’S SUFFRAGE BY CONSTITUTIONAL AMENDMENT (1916). For more information on Tucker, see generally JAMES GRAFTON ROGERS, AMERICAN BAR LEADERS: BIOGRAPHIES OF THE PRESIDENTS OF THE ABA 1878-1928 (1932).

3. Richard A. Posner, Introduction to THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR., at x (Richard A. Posner ed., 1992).

4. Though familiar to generations of lawyers as an essay, it was in fact an address delivered by Holmes on January 8, 1897 at the dedication of the new hall of the Boston University School of Law.

5. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897) [hereinafter Holmes, *Path*].

Much could be said (and, indeed, has already been said)⁶ about *The Path of the Law*, but for present purposes I am focusing on the remarkable metaphor of the “bad man” as a jurisprudential guide to the essence of legal decisionmaking.⁷

In *The Path of the Law*, Justice Holmes⁸ defined law as simply a prediction about how particular cases might be decided⁹ and illustrated this instrumental approach through the metaphor of a “bad man” who is interested only in avoiding legal penalties that might attach to his conduct or business affairs.¹⁰ In such a world view, the lawyer serves as an amoral facilitator or defender of the “bad man” client’s wishes. This metaphor has found resonance in the instrumentalism of the trendy and influential law and economics literature and pedagogy, to which the last thirty years of law graduates have been exposed. There, the principal, if not sole, reason to obey the law is the apprehension of legal sanctions, and minimizing their likelihood becomes the lawyer’s sole task.¹¹

Over the last 40 years, a sequence of scandals (including the *National Student Marketing* case, the OPM matter, the S&L debacle, the massive BCCI fraud, the seemingly endless corporate/securities scandals exemplified by the collapse of Enron, and proliferation of abusive tax shelters), which the self-regulatory structure of bar-crafted rules was powerless to abate, brought degradation and disrepute to public perception of the legal profession and incremental federal encroachment upon self-regulation by the bar.¹² That even the litigation sphere is not immune was recently illustrated by the scorched earth tactics employed by advocates

6. See, e.g., *THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 33 (Steven Burton, ed. 2000); Anne C. Dailey, *Holmes and the Romantic Mind*, 48 DUKE L.J. 429489 (1998); *Symposium: The Path of the Law Today*, 78 B.U. L. REV. 791 (1998); *Symposium: The Path of the Law After One Hundred Years*, 110 HARV. L. REV. 989 (1997).

7. Holmes’s “bad man” metaphor may well have been borrowed, albeit without attribution, from a 19th century German author on jurisprudence. See RUDOLF VON JHERING, *LAW AS A MEANS TO AN END* 33 (Isaac Husik trans., 1913). Holmes was undoubtedly familiar with the work of German legal theorists. See MARK DEWOLFE HOWE II, *JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS, 1870-1882* 152 (1963). Others have previously noted that Holmes was “loath to acknowledge influences on and antecedents of his work.” G. EDWARD WHITE, *OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 113 (1993). Similarly, Judge Posner, though a great admirer of Holmes as a thinker, judge, and legal theorist, has remarked that he was “ungenerous to his intellectual predecessors . . .” Richard A. Posner, *Bookshelf: Star of the Legal Stage*, WALL ST. J., Aug. 9, 1989, at A9 (reviewing SHELDON M. NOVIK, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES* (1989)).

8. Holmes was then a Justice of the Supreme Judicial Court of Massachusetts.

9. Holmes, *Path*, *supra* note 5, at 461.

10. *Id.* at 459.

11. See, e.g., Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984); Thomas S. Ulen, *Firmly Grounded: Economics in the Future of the Law*, 1997 WIS. L. REV. 433; RICHARD A. POSNER, *THE ECONOMIC ANALYSIS OF LAW* (4th ed. 1992). Cf. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 230-240 (1993) (arguing that law and economics has had a dominant and deleterious effect on how law is taught).

12. In a previous article, I have described in some detail these scandals and their fallout, used insights from public choice theory to describe the collective action and regulatory capture problems undermining the development of effective self-regulation by the bar, and identified the problems

representing various dioceses of the Catholic Church in the priest sex abuse scandals.¹³ Of even more recent vintage is the notorious legal analysis by the Justice Department's Office of Legal Counsel facilitating the torture of suspected terrorists by, or at the direction of, the United States Government.¹⁴

The thesis of this essay is that most, if not all, of these could have been avoided by a culture of contextual interpretation of law and legal texts that rejects mere instrumentalism in favor of objective, learned, and professional assessment of the marriage of jurisprudence to client goals. As is only appropriate for the celebratory outlook of this centennial, my theme in this disquisition harkens back to, and seeks to reinvigorate, the afflatus embodied in Canon 32, "The Lawyer's Duty in its Last Analysis":

No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving *disloyalty to the law whose ministers we are*¹⁵

This fundamental obligation of stewardship provides the necessary foundation for contextual ethical reasoning.

From the Canons to the Model Rules

After adoption of the *Canons* in 1908, manifold and substantial changes to American society and the legal profession were wrought during the chaotic 20th Century. Nevertheless, the impetus for the *Canons* will sound familiar to modern ears: a concern over the commercialization of the profession and its low public esteem.¹⁶

posed by piecemeal federal regulation of law practice. See Keith R. Fisher, *The Higher Calling: Regulation of Lawyers Post-Enron*, 37 U. OF MICH. J. L. REFORM 1017 (2004).

13. For a sampling of thoughtful discussion of these issues, see, e.g., Robert K. Vischer, *Legal Advice as Moral Perspective*, 19 GEO. J. LEGAL ETHICS 225, 247-254 (2006); Patrick J. Schiltz, *Defending the Church*, LITIGATION, Spring 2003, at 19.

14. See text accompanying notes 36-60, *infra*.

15. ABA CANONS OF PROFESSIONAL ETHICS Canon 32 (1908) (emphasis added). Canon 32 goes on to forbid, *inter alia*, any "deception or betrayal of the public."

16. Part of the *raison d'être* of local, state, and national bar associations was the regulation, if not the censure, of a "notorious fringe of unlicensed practitioners." LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 562-563 (1973). As articulated mid-century in the memoirs of one of the luminaries of the bar, "I came to feel that the American lawyer should regard himself as a potential officer of his government and a defender of its laws and constitution. I felt that if the time should ever come when this tradition had faded out and the members of the bar had become merely the servants of business, the future of our liberties would be gloomy indeed." Henry L. Stimson, *Introduction* in HENRY L. STIMSON & MCGEORGE BUNDY, ON ACTIVE SERVICE IN PEACE AND WAR xxii (1947). Yet barely concealed beneath the high-minded mantle of professional sentiment lay also an ugly, discriminatory underbelly. The drafters of the *Canons* were all mainstream white males who, like the early membership of the A.B.A. as a whole, represented (and were a part of) the social elite. Recent immigrants and their children, as well as members of religious minorities were only just beginning to fight their way into this club, while women and ethnic minorities had decades of struggle ahead of them. See, e.g., MARY ANNE GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 28, 35 (1994). "[T]he tiny elitist sector of the legal profession represented by

Interestingly for those same modern ears, accustomed to a secular legal profession, the original call for the *Canons* was explicitly religious and moral.¹⁷ The ABA Committee charged with the task was not writing on a clean slate, but was building on 19th century scholarship¹⁸ as well as ethics codes adopted by state bar associations.¹⁹ As adopted by the ABA in 1908, the *Canons*—which were not intended as binding rules but merely as principles hortatory in nature²⁰—incorporated moral precepts²¹ but leavened them with the intensely practical as well.²²

the ABA in the early 1900s was strongly opposed to the influx of ‘new’ lawyers into the profession, especially those from immigrant backgrounds and low socioeconomic classes.... Comfortable in the business that came their way by virtue of their social connections, the lawyers who made up the membership of the ABA looked with disdain on the scrambling, ungraceful efforts to gain business engaged in by some newcomers to the bar....” Susan D. Carle, *Lawyers’ Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 LAW & SOC. INQUIRY 1, 8 (1999), citing JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 43-130 (1974).

17. See James M. Altman, *Considering the A.B.A.’s 1908 Canons of Ethics*, 71 *FORD. L. REV.* 2395, 2407 (2003).

18. To wit: DAVID HOFFMAN, *FIFTY RESOLUTIONS FOR PROFESSIONAL DEPORTMENT* (1836) and GEORGE SHARSWOOD, *LEGAL ETHICS* (1854), both of which relied to a greater or lesser extent (the former more than the latter) on religious precepts in seeking to articulate—in each case for law students—a jurisprudence of lawyer conduct. Hoffman taught for a time at the University of Maryland and penned his Resolutions as an anodyne to what he regarded as a degeneration of ethical standards and professional independence during the era of President Andrew Jackson. His religious-based jurisprudence would bar lawyers from using legitimate, instrumental means to achieve unjust results. Sharswood, a Justice of the Pennsylvania Supreme Court who taught part-time at the University of Pennsylvania, took the view that loyalty to the interests of a client should invariably yield to the lawyer’s own sense of justice. See generally Carle, *supra* note 16, at 10-13.

19. “State of the art” at the time was the Code adopted by the State Bar of Alabama, which had been drafted in 1887 by Thomas Goode Jones based in large part on Sharswood’s treatise. Carle, *supra* note 16 at 9-10.

20. Cf. CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 55-56 (1986) (opining that “[t]he Canons were probably not intended to have any direct legal effect”). But see 29 A.B.A. Rep. 602-03 (1906) (expressing the hope—more, perhaps, like a daydream—that lawyers entering the bar would have to swear an oath to follow the *Canons*, thereby bootstrapping them into something enforceable). That hope/daydream proved, in the main, to be forlorn; notwithstanding the success of the *Canons* (they were quickly adopted in 31 out of the 45 extant bar associations, see 39 A.B.A. Rep. 560-61 (1914)) they were deemed useful as general statements of ethical standards but at most persuasive authority in court. Describing Canon 13, instructing that “contingent fees, when sanctioned by law, should be under the supervision of the court in order that clients may be protected from unjust charges,” a New York court characterized it as “addressed rather to the judges and the legislators than to the bar, and legislation may be necessary to carry it fully into effect....” *Ransom v. Ransom*, 70 Misc. 30, 127 N.Y.S. 1027, 1033 (N.Y. Sup. Ct. 1910), *rev’d on other grounds*, 147 App. Div. 835, 133 N.Y.S. 178 (1st Dept. 1911). *Accord, In re Cohen*, 261 Mass. 484, 487, 159 N.E. 495, 496-97 (Mass. 1928) (“Codes of legal ethics adopted by bar associations have no statutory force....”).

21. For example, Canon 16 deals with “Restraining Clients from Improprieties,” Canon 18 requires respectful “Treatment of Witnesses and Litigants,” and Canon 22 requires “Candor and Fairness.”

22. The practical prohibitions were among the most controversial, which made them a harbingers of the ABA’s future definitional struggles for minimum rules. The only Canon that caused any actual debate, however, concerned contingent fees, which were allowed, but only under the supervision of court. Altman, *supra* note 17, at 2482-84. The Canons also prohibited a lawyer from

The considerably more recent *Model Rules of Professional Conduct*,²³ are intended, unlike the *Canons*, to be not hortatory but mandatory in nature. That transition—with the intermediate (and relatively short-lived) step of the hybrid²⁴ Model Code of Professional Responsibility—has gradually separated the more positivist, rules-based regime²⁵ from the earlier, more ethically grounded approach.²⁶ Moreover,

purchasing “any interest in the subject matter of the litigation which he is conducting” or “stirring up . . . litigation.” 33 A.B.A. Rep. at 578, 583.

Interestingly, the *Canons* expressly barred lawyer advertising, *id.* at 582, even though not only its most influential predecessor, the 1887 Code of Ethics of the Alabama State Bar Association, but other progenitors as well, explicitly allowed it. ABA CANONS OF PROFESSIONAL ETHICS Canon 27 (1908). This proscription caught on. “For a lawyer to advertise for business has long been recognized by the profession at large as grossly undignified and improper, and has been condemned distinctly by . . . the Code of Ethics adopted generally by the Bar Associations of this country . . . While this Code has never been incorporated into our statutes, . . . a general rule of practice requires that a copy . . . be furnished to each lawyer upon his admission to the bar.” *In re Neuman*, 169 A.D. 638, 641, 155 N.Y.S. 428, 430-31 (N.Y. App. Div. 1915) (ordering one-year suspension for attorney who advertised himself as a specialist in divorce law in the program of the “Negro Clinic League Banquet”). *Cf.* Sonja J. M. Cooper, *Comments on Lawyer Advertising Papers*, 14 LAW & LITERATURE 207, 210 (2002) (speculating that court’s negative reaction to the advertisement arose not from the possibility that it would increase the divorce rate but from a white lawyer offering legal services, and access to the courts, to minorities). So influential were the *Canons* and their legacy that First Amendment limitations on bar-imposed advertising strictures did not emerge until the late 1970’s. *See* *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978); *In re Primus*, 436 U.S. 412 (1979). The controversy persists, as courts and bar associations explore limits on the constitutional protection of commercial speech, *see, e.g.*, *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), and as new technologies change the face of advertising, *see* Daniel Backer, Note, *Choice of Law in Online Legal Ethics: Changing a Vague Standard for Attorney Advertising on the Internet*, 70 FORDHAM L. REV. 2409 (2002); Connor Mullin, *Regulating Legal Advertising on the Internet: Blogs, Google & Super Lawyers*, 20 GEO. J. LEGAL ETHICS 835 (2007).

23. AMERICAN BAR ASS’N, MODEL RULES OF PROF’L CONDUCT (2007). For an appreciation of the evolution of the Model Rules from their first iteration in 1982 through 2005, *see generally* A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005 (A.B.A. 2006). To update through the adoption by the House of Delegates of amendments to Model Rules 5.5 (at the February 2007 midyear meeting) and 3.8 (at the February 2008 midyear meeting), *see* Center for Professional Responsibility, Model Rules of Professional Conduct, Current Model Rules, available at http://www.abanet.org/cpr/mrpc/model_rules.html (last visited Feb. 28, 2008). Interesting and valuable historical commentary can be found in, *inter alia*, W. William Hodes, *The Code of Professional Responsibility, The Kutak Rules, and the Trial Lawyer’s Code: Surprisingly, Three Peas in a Pod*, 35 U. MIAMI L. REV. 739 (1981); Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243 (1985); Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 L. & Soc. INQUIRY 677 (1989); Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239 (1991).

24. Hybrid in the sense that it sought to combine the mandatory (the Disciplinary Rules) with the hortatory (the Ethical Considerations).

25. *See* Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 IOWA L. REV. 901 (1995) (criticizing the emergence of a “positivist” approach to lawyer self-regulation).

26. *See generally* Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers*, 32 VAND. J. TRANSNAT’L L. 1117 (1999); WOLFRAM, *supra* note 20, at 69-70.

the mandatory characteristic has proved more elusive than the designation “Rules” (model or otherwise) would suggest. Like other codes referred to by civilized society as morals, values, standards, or ethics, these “Rules” are a set of behaviors, gleaned from the social fabric, that are susceptible to selective application and interpretation. The underlying approach—unwavering commitment to clients even if that commitment produces immoral or unjust (but not technically unlawful) results—usually allows a lawyer to pursue any goal of the client through any arguably legal course of action and to assert any nonfrivolous legal claim.

This prototype works best in an adversarial milieu, governed by rules of procedure and evidence and presided over by a neutral and detached decision-maker, where each side is represented by a lawyer relatively unfettered when it comes to advocating the client’s interests. Outside the litigation context, however, the model has frequently failed spectacularly where the lawyer acts as counselor, adviser, or facilitator of business transactions; there the indeterminacy of bar-crafted ethics rules and increasingly cut-throat competition for clients have created a variety of perverse incentives that have caused many thitherto well-regarded and accomplished practitioners to lose their moral compass.²⁷

Re-enter the Holmesian “Bad Man”

Naturally, Holmes’s “bad man” is not concerned with such abstractions as objectivity, jurisprudence, or professionalism. He simply wants to know the “material consequences” of his conduct—*i.e.*, what he may expect the courts to let him get away with, using Holmes’s idiosyncratic, proto-Realist definition of law:

“[Y]ou must look at [the law] as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or out of it, in the vaguer sanctions of conscience.”²⁸

27. As I have previously had occasion to observe, business lawyers are comfortable—perhaps too comfortable—with the proposition that conduct is not unlawful unless there is precedent squarely on point that declares it so; to the extent there are distinguishing facts, the lawyer will often (and often self-righteously) assert the client’s entitlement to representation coupled with the fact that the lawyer is not “knowingly” assisting any illegality. It is a technique not dissimilar to that often employed by a good bridge player when faced, as declarer, with the task of making a difficult contract: one imagines the lie of the opponents’ cards to be such as will permit a particular line of play to succeed, and then proceed to play the hand as though the cards do, in fact, lie that way. The lawyer simply imagines that what the client seeks to do is legal, then proceeds to represent the client as though the client’s object is, in fact, lawful, and takes refuge in the soft, bar-crafted ethical cocoon where lawyers rarely, if ever, “know” that a client is acting unlawfully.

Fisher, *supra* note 12, at 1021-1022 (footnotes omitted).

28. Holmes, *Path*, *supra* note 5, at 459.

Who (or what) is the Holmesian bad man? Is he “the Napoleon of crime” as characterized by another 1890’s (albeit fictional) Holmes?²⁹ Is he simply a client in need of legal advice? Is he, more specifically, the self-interested, pre-moral rational calculator of costs and benefits familiar from law and economics literature? Justice Holmes does not elaborate.

Whatever the bad man may be, however, it is easy to delineate what Justice Holmes thought he is *not*; Holmes himself contrasts the bad man with the good man, the latter being one “who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.”³⁰ Holmes means to contrast the bad man not just with someone who consciously endeavors to structure business interactions in order to remain on the “right” side of the law,³¹ but with someone who is guided by a developed and deeply considered sense of moral judgment in all matters of social intercourse. In short, Holmes’s “good man” is a person of conscience, and Holmes’s “bad man” is not.

The bad man’s perspective, as identified by Holmes, is not itself irrational, as law and economics exponents would surely agree, but it is only one of many interpretive approaches toward Law (with a capital “L”) that a lawyer may adopt. It happens, however, to be the one least calculated to vindicate the purposes of legal rules or the legal system they embody. A lawyer is not a myrmidon. Nor is he a mere scrivener. For regardless of whether a lawyer is a litigator, a counselor, a dealmaker—or whether he works as in-house counsel, government lawyer, or private practitioner—the role captured by the phrases “officer of the court” and “member of the bar” denotes an obligation of stewardship of Law (again, writ large) and the legal system. True, a lawyer owes duties—loyalty, confidentiality, and so forth—to the client, but these duties are not absolute.³² They must be refracted through the prism of the lawyer’s supervening obligation to the integrity of the Law and the administration of justice, an obligation that can be satisfied by “tactfully nudg[ing] [the client] to comply [with the law], usually by pointing out the risks of doing otherwise.”³³

29. A. CONAN DOYLE, *THE ADVENTURE OF THE FINAL PROBLEM* (1893).

30. Holmes, *Path*, *supra* note 5, at 459.

31. Fortunately, while clients will naturally wish to minimize the impact of laws that inconvenience them, most also want to comply with the law. That is not necessarily so for the Holmesian bad man.

32. Indeed, they bow readily enough to lawyer self-interest. *See, e.g.*, MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(5) (2007) (exception to confidentiality obligation to assist lawyer in controversy with client). *See also* Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 3-9 (1998) (confidentiality rules are structured primarily for the benefit of lawyers); Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 270-272 (1985) (*simile* for conflict of interest rules). *Cf.* Daniel R. Fischel, *Multidisciplinary Practice*, 55 BUS. LAW. 951, 974 (2000) (taking the example of prohibitions on fee sharing and noting that proponents of that prohibition “have attempted to cloak their arguments in the rhetoric of ‘professionalism,’ ‘lawyer’s independence,’ and the ‘public interest,’ [though] their goals are no different from any other trade union or interest group pursuing economic protectionism.”).

33. Robert W. Gordon, *A Collective Failure of Nerve: The Bar’s Response to Kaye Scholer*, 23 LAW & SOC. INQUIRY 315, 320 (1998). Professor Gordon observes, however, that “the *norm* that

What if that “nudging”—or remonstrating, as it is often described in the ethics literature—should fail? The duty of loyalty to the client is now strained to the breaking point. The ethical lawyer may no longer hide behind the often self-congratulatory stance of that segment of the bar that exalts the “hired gun” mindset and praises the craft of lawyering while ignoring the social consequences.

The solution to world hunger is not, after all, to eat someone else’s lunch. Therefore, the supervening obligation to vindicate the integrity of Law and the legal system will at times require *repudiation* of the methods or the goals of a Holmesian bad man client and a departure from what has become among the practicing bar a reflexive mindset of loyalty to the client and the client’s objectives.

Let me, however, interpose two important clarifications. First, I am talking about civil, not criminal representation, in which constitutional constraints make a purely partisan, “hired gun” model of representation appropriate, or at least arguably acceptable. Second, let me identify the basis for the occasionally necessary repudiation I’m suggesting. It does not derive from religion, morality, or moral philosophy *per se*, though there has been recent and valuable scholarship using those beliefs and value systems as the predicate for lawyers’ disavowal of client objectives.³⁴ Rather, I find the supervening obligation leading to such repudiation to be derived from melding the obligation of stewardship into the totality of the representation and the statutory, regulatory, decisional, and/or policy factors that inform and provide context for the legal task(s) at hand.

The professional obligation of stewardship I am advocating can take many forms.

- In the interpretation of legal texts, it requires a reasoned justification for particular interpretive stances, with full attention to, and identification of, conflicting interpretations and unfavorable precedent; for an interpretation on one end of a spectrum of possible constructions of the text, fealty to both the client and to the stewardship responsibilities entails, at a minimum, apprising the

part of the lawyer’s role is to represent the public purposes of the legal system to the client...has been seriously weakened by the spread of ideology that privatizes the lawyer’s role.” *Id.* at 320-321 (emphasis in original).

34. For a sampling, *see, e.g.*, Daniel R. Coquillette and Judith A. McMorrow, *Toward an Ecclesiastical Professional Ethics: Lessons from the Legal Profession*, in CHURCH ETHICS AND ITS ORGANIZATIONAL CONTEXT: LEARNING FROM THE SEX ABUSE SCANDAL IN THE CATHOLIC CHURCH (J. BARTUNEK ET AL EDS., 2005); Russell G. Pearce & Amelia J. Uelmen, *Religious Lawyering in a Liberal Democracy: A Challenge and an Invitation*, 55 CASE W. RES. L. REV. 127 (2004); Robert K. Vischer, *Heretics in the Temple of Law: The Promise and Peril of the Religious Lawyering Movement*, 19 J. L. & RELIGION 427 (2004); Martha Minow, *On Being a Religious Professional: The Religious Turn in Professional Ethics*, 150 U. PA. L. REV. 661 (2001); Teresa Stanton Collett, *Speak No Evil, Seek No Evil, Do No Evil: Client Selection and Cooperation with Evil*, 66 FORDHAM L. REV. 1339 (1998); Nancy B. Rapoport, *Living “Top-Down” in a “Bottom-Up” World: Musings on the Relationship Between Jewish Ethics and Legal Ethics*, 78 NEB. L. REV. 18 (1999); Teresa Stanton Collett, *Professional versus Moral Duty: Accepting Appointments in Unjust Civil Cases*, 32 WAKE FOREST L. REV. 635 (1997).

client of the “cutting edge” (if that is the proper characterization) or radical nature of the interpretation and the risks attending conduct premised thereon.

- In the structuring and documenting of transactions, it means far more than technical competence (or even mastery) and unidimensional loyalty to the self-interested demands of business clients for “creative” or “aggressive” positions without regard to the rights and interests of third parties and the integrity of the legal system. Preserving that integrity is NOT someone else’s responsibility but is one shared by all lawyers.³⁵
- In opinion practice, it means more than the age-old exaltation of form over substance or the equally hoary custom of diluting the opinion’s value (and the potential liability of the lawyers rendering it) by limiting the inquiry, factual or otherwise, upon which the legal views expressed are based.

Interpretation of Legal Texts: The Infamous “Torture Memo”

It should not have been news to lawyers in the Justice Department’s Office of Legal Counsel—regardless of personal political ideology or affiliation—that torture and cruel, inhuman, and degrading treatment are not merely illegal under international law³⁶ but anathema to American values and constitutional

35.

Lawyers have, I think, fallen into the habit of thinking that maintaining the integrity of the legal framework is always someone else’s problem (even as, in their roles as lobbyists and power brokers, they may press for political change to weaken or alter that framework). But, of course, the order of rules and norms, policies and procedures, and institutional actors and roles that make up the legal system is not some alien excrescence; it is, for all its glaring faults and weaknesses, the common public framework of our social life, which sets the basic ground rules for profit seeking in commerce and other exercises of personal autonomy. Like any other regime of legal rules, it is only as effective as voluntary compliance can make it; for if people routinely start running red lights when they think no cop is watching (or hire lawyers to keep a lookout for the cops, and to exhaust the resources of traffic courts arguing the lights were green), the regime will collapse.

Gordon, *supra* note 33, at 321.

36. Apart from purely public international law authorities, U.S. courts have declared, in interpreting the Alien Tort Statute, 28 U.S.C. § 1350, that the prohibition against torture is a *jus cogens* norm under which the “torturer has become—like the pirate and the slave trader before him—*hostis humani generis*, an enemy of all mankind.” *Filatiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980). *Accord*, *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995); *In re Estate of Ferdinand Marcos, Human Rts. Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994). Among *jus cogens* prohibitions listed in the United States’ own Restatement of Foreign Relations Law are: murder or causing the disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination; and a consistent pattern of gross violations of human rights. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (c)-(g) (1987). Other, more recent examples of U.S. statutes outlawing torture include the legislation implementing U.S. accession to the Convention Against Torture, *infra* note 40, 18 U.S.C. §§ 2340, 2340A (making torture a criminal offense punishable by at least 20 years’ imprisonment and possibly

traditions.³⁷ Since 1791, the Eighth Amendment has prohibited “cruel and unusual punishment.”³⁸ Likewise lurking is a potential violation of due process under the Fifth Amendment, which the Supreme Court has for over 50 years interpreted to prohibit interrogation techniques that “shock the conscience.”³⁹ Beyond that, of course, are a variety of international legal instruments to which the United States is a party,⁴⁰ to say nothing of the developing international human rights law.

None of this dissuaded, or even apparently affected, the legal opinion rendered by then-Assistant Attorney General (and now Circuit Judge) Jay S. Bybee of the Office of Legal Counsel (OLC) to then-Counsel to the President (and later U.S. Attorney General) Alberto R. Gonzales regarding coercive interrogation tactics.⁴¹ Gonzales had inquired of OLC whether U.S. officials can use tactics tantamount to torture against suspected terrorists, without being held liable under a federal statute that criminalizes torture.⁴²

death), and the Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1003, 119 Stat. 2379, 2379 (prohibiting cruel, inhuman, or degrading treatment or punishment of persons under the custody or control of the U.S. government). More generally, our courts have recognized that cruel or inhumane treatment “cannot comport with human dignity.” *Furman v. Georgia*, 408 U.S. 238, 271, 279-81, 286 (1972); *see also* *Bell v. Wolfish*, 441 U.S. 520, 583 (1979); *Estelle v. Gamble*, 429 U.S. 97, 102 (1976); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976); *United States ex rel. Caminito v. Murphy*, 222 F.2d 698, 701 (2d Cir. 1955) (psychological torture, cruelty).

37. *See* George W. Bush, Statement on the U.N. International Day in Support of Victims of Torture, June 26, 2003, 1 Pub. Papers 701, 701 (June 26, 2003) (“Torture anywhere is an affront to human dignity everywhere”).

38. U.S. CONST. amend. VIII. The “primary concern of the drafters [of the Eighth Amendment] was to proscribe ‘torture(s)’ and other ‘barbar[ous]’ methods of punishment.” *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (alteration in original) (quoting Anthony F. Granucci, “*Nor Cruel and Unusual Punishment Inflicted: The Original Meaning*,” 57 CAL. L. REV. 839, 842 (1969)).

39. *See, e.g.,* *Rochin v. California*, 342 U.S. 165, 172-73 (1952) (pumping suspect’s stomach using emetic to search for morphine capsules). *See also* *Brown v. Mississippi*, 297 U.S. 278, 285-286 (1936) (concluding that under due process “[t]he rack and torture chamber may not be substituted for the witness stand”).

40. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg, U.N. Doc. A/810, art. 5 (Dec. 12, 1948) (stating that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 113, *reprinted at* 23 I.L.M. 1027 (1984) (requiring each signatory state to criminalize all acts of torture and take effective measures to prevent acts of torture in all territories under its jurisdiction); *id.* art. 2 (“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”). Similar prohibitions against torture are found in the third and fourth Geneva Conventions and in Common Article 3 to all four Geneva Conventions.

41. Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), *available at* <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/index.htm> (last visited Jan. 8, 2008) [hereinafter the “OLC Opinion”].

42. *See* 18 U.S.C. §§ 2340-40A (person who commits torture is subject to a fine or imprisonment for up to 20 years, or both, and if the victim should die from the torture, the torturer may be sentenced to life imprisonment or death).

Answering in the affirmative, the Bybee Memo first defined “torture” so narrowly as to require that the interrogator have the precise objective of inflicting physical pain equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.⁴³ Second, the Opinion concluded that criminal prohibitions against torture do “not apply to the President’s detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority”⁴⁴ and that “[a]ny effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution’s sole vesting of the Commander-in-Chief authority in the President.”⁴⁵ Finally, expanding on the “I vaz only followink orders” mantra so effectively lampooned in television comedies such as *Hogan’s Heroes* and so resoundingly condemned at Nuremberg, the Opinion suggested that executive officials could escape prosecution for torture on the ground that “they were carrying out the President’s Commander-in-Chief powers”;⁴⁶ in other words, the application of a valid federal criminal statute “to punish officials for aiding the President in exercising his exclusive constitutional authorities”⁴⁷ could be precluded.

This legal opinion, roundly castigated as the so-called “Torture Memo,” suffers from too many infirmities to catalogue comprehensively here, but a few obvious ones bear mention. First, it makes no mention whatever of the legal and historical context in which it is being written. Second, it adopts a definition of “torture” that is, if you will forgive the pun, nothing short of “tortured,” to the point of blatant disregard of the term’s plain meaning.⁴⁸ Third, the Opinion asserts that criminal prohibitions against torture do “not appl[y] to interrogations undertaken pursuant to [the President’s] Commander-in-Chief authority.”⁴⁹ Finally, the

43. See OLC Opinion, *supra* note 41, at 5-7.

44. *Id.* at 35.

45. *Id.* at 39.

46. *Id.* at 35.

47. *Id.*

48. Interestingly, before invading Iraq to oust Saddam Hussein, the United States pointed out that his security services had used such “torture techniques [as] branding, electric shocks administered to the genitals and other areas, beating, pulling out of fingernails, burning with hot irons and blowtorches, suspension from rotating ceiling fans, dripping acid on the skin, rape, breaking of limbs, denial of food and water, extended solitary confinement in dark and extremely small compartments, and threats to rape or otherwise harm family members and relatives.” See Saddam Hussein’s Repression of the Iraqi People, *available at* <http://www.whitehouse.gov/infocus/iraq/decade/sect4.html>. Yet under the absurdly narrow legal definition in the OLC Opinion, many of these heinous acts would not constitute torture!

49. OLC Opinion, *supra* note 41, at 34. This analysis and advice arguably verges on malpractice. The Eighth Amendment does not say “nor [shall] cruel and unusual punishments [be] inflicted” except when the President decides otherwise. Nor does any part of the Fifth Amendment’s Due Process Clause jurisprudence sanction torture by executive officials. It also begs the obvious moral question: If the U.S. President has authority, as Commander-in-Chief, to authorize torture in the name of war, then why wouldn’t the maddest, most insanely sadistic despot, operating obviously without the constraints of the U.S. Constitution, have similar license to authorize torture?

Opinion declares, without analysis of controlling Supreme Court precedent—that “[a]ny effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution’s sole vesting of the Commander-in-Chief authority in the President.”⁵⁰

Overall, the OLC opinion treats a *jus cogens* norm of international law, and a paramount precept of our Founding Fathers, as though torture were no more significant than Robert Gordon’s metaphor of running the red light.⁵¹ A legal opinion so adrift from U.S. historico-legal context, that offers a definition of torture so narrow that it would have exculpated Saddam Hussein himself, that reads the President’s Commander-in-Chief authority so sweepingly as to remove the checks and balances of Congress and the Judiciary so presciently infused by the Framers into the Constitution, that vitiates the lessons of Nuremberg and the Holocaust, and that gives government a license for wanton cruelty, can only be described as the triumph of the Holmesian bad man and the dereliction of fundamental principles of professional responsibility. Had the authors of the OLC Opinion examined the issue they were tasked with analyzing in the context of existing U.S. law, policy and Constitutional history, as well as established principles of public international law, they could not ethically have provided the incomplete, unidimensional, and patently perilous legal advice they rendered. Given the OLC Opinion’s strained, even specious reasoning and its dangerous implications, the facile way in which its authors provided legal justification for the degradation of fellow human beings is nothing if not a badge of shame upon the profession.

To be sure, lawyers are entitled to a certain amount of flexibility when interpreting legal texts, but drawing too many inferences from statutory silence is a risky enterprise. Thus even if an OLC attorney were reasonably able to conclude that a governing statute does not, on its face, absolutely interdict physical abuse

50. *Id.* at 39. The OLC Opinion displays a single-minded focus on what is argued to be the extent of the President’s Commander-in-Chief powers. Conspicuous by its absence from the Opinion, however, is any mention—much less consideration—of the Supreme Court’s jurisprudence on the limits of the President’s claimed Commander-in-Chief powers. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Dames & Moore v. Regan*, 453 U.S. 654 (1981). In *Dames & Moore*, the Court elevated to constitutional doctrine Justice Jackson’s concurrence in *Youngstown*: “Presidential powers are not fixed, but fluctuate, depending upon their disjunction or conjunction with those of Congress When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.” *Youngstown*, 343 U.S. at 635, 637 (Jackson, J., concurring). Tellingly, the Constitution vouchsafes only to Congress, in Article I, § 8, the power to “define and punish . . . offences against the law of nations” such as torture, and to “make Rules for the Government and Regulation of the land and naval Forces.” If the OLC Opinion were correct, then Congress could not have, for example, enacted the Uniform Code of Military Justice, 10 U.S.C. § 801 *et seq.*, which necessarily proscribes torture as part of the prohibition against compulsion of “any person to incriminate himself or to answer any question the answer to which may tend to incriminate him,” *id.* § 831(a), and which forbids the introduction into evidence of any “statement obtained . . . through the use of coercion . . .,” *id.* § 831(d).

51. See note 35, *supra*.

of an individual during interrogation, the analysis is far from over. None of the procedural protections of the adversarial context obtains here, and the lawyer is not free simply to imagine an interpretation that will permit what he perceives the client wants and then furnish that interpretation. Fealty to Law demands analysis *in context*,⁵² and context here requires an assessment of congressional purpose in enacting the statute, examination of relevant instruments of international law to which the United States is a party, consideration of preemptory norms of international law (*jus cogens*),⁵³ and, in every case, identification of what is in the best interests of the client.

Clearly, this is not the occasion for an extended exegesis on public international law.⁵⁴ Suffice it to say that consideration of, at a minimum, the legal legacy of the Nuremberg trials, the language of the Torture Convention,⁵⁵ and Common Article 3 of the Geneva Conventions,⁵⁶ would explicate the proper understanding of “torture” within the meaning of the statute.

Equally important is an appreciation of the client’s interests. Here the client was neither the President, nor the White House Counsel but the Government of the United States itself. As such, it is a species of institutional client, capable of being led astray (as Enron was) by “management” or agents who are Holmesian bad men. Since the authors of the OLC Opinion knew or should have known that their advice would be relied upon to shape U.S. interrogation policies, their obligation was to minimize the potentially adverse consequences of that advice in order to ensure that nobody acting thereon would, by misinterpretation, misunderstanding,

52. The drafters of the OLC Opinion sought desperately to avoid this obligation, as evidenced by their bizarre—and utterly out-of-context—reliance on language from statutes governing medical benefits in order to inform a radical and strained construction of what constitutes “severe pain” and therefore, by extension, “torture.” See OLC Opinion, *supra* note 41, at 5-6 (citing 42 U.S.C. §§ 1395w-22, 1395x, 1395dd, 1396b, 1396u-2).

53. One should also be mindful of that venerable canon of statutory construction, announced by Chief Justice Marshall in *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . . .” See generally Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1998).

54. Others have shouldered that burden admirably. For a sampling of the post-OLC Opinion literature, see, e.g., Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT’L L. 811 (2005); Harold Hongju Koh, *A World Without Torture*, 43 COLUM. J. TRANSNAT’L L. 641 (2005); David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425 (2005); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005); Johan D. van der Vyver, *Torture as a Crime Under International Law*, 67 ALBANY L. REV. 427 (2003). Cf. Milan Markovic, *Can Lawyers Be War Criminals?*, 20 GEO. J. LEGAL ETHICS 347 (2007).

55. See Torture Convention, *supra* note 40, art. 2 (“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”).

56. See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516 (prohibiting “violence to life and person” as well as “mutilation, cruel treatment, and torture”).

willful blindness, or otherwise, harm the interests of that client. Hence an aggressively instrumentalist interpretation of the kind exemplified by the OLC Opinion was almost certain to lead to the abuse of detainees and was therefore strongly contraindicated—not just because it would necessarily lead to gross violations of human rights and human dignity but also because it would expose the client, the United States, to international ridicule and opprobrium and could cripple, perhaps permanently, its ability to claim the moral high ground in virtually any diplomatic context.

In the wake of the OLC Opinion and the Bush Administration's reliance thereon, that is precisely what has come to pass. The result has been nothing short of calamitous. The OLC Opinion and the resulting conduct have besmirched the country's reputation internationally, even (or perhaps especially) among its allies, and has created internal dissension and discord at home,⁵⁷ tarnished the reputation of military justice, drawn into question the United States' oft-articulated commitment to the rule of law, and sullied the Justice Department's reputation (and especially that of the OLC) for objectivity and integrity.

To avert, or at least palliate, such an eventuality, applying a contextual ethical reasoning approach⁵⁸ would counsel the following course of conduct. At the outset,

57. See, e.g., Katherine Shrader, *Senate Intel Panel to Assess Secret Prisons*, ORLANDO SENTINEL, Mar. 25, 2007, at A9 (quoting Senate Intelligence Comm. Chair Jay Rockefeller (D-W. Va.) as saying, "The widespread reports about secret prisons and torture, whether accurate or not, have damaged the United States' reputation around the world and hindered counterterrorism efforts with our allies"); Robert F. Kennedy, Jr., *America's Anti-Torture Tradition*, L.A. TIMES, Dec. 17, 2005, at 21 (recounting efforts of Washington, Lincoln, Eisenhower, and MacArthur to accord humane treatment to prisoners, regardless of the atrocities perpetrated upon American prisoners); Demetri Sevastopulo & Holly Yeager, *Principled McCain Prevails Over White House: The Senator Who Won the Torture Battle is a Force to be Reckoned with in Washington*, FIN. TIMES (U.K.), Dec. 17, 2005, at 8 (reporting Senator John McCain's views that "[p]assing legislation banning abusive treatment for prisoners . . . would improve the country's reputation overseas and help the administration in its efforts to combat terrorism . . . by reducing some of the resentment against Americans").

58. I would go so far as to suggest that even under the narrow, context-suppressing approach of the Model Rules, the authors of the OLC Opinion may have violated already well-established rules of legal ethics. First, under Rule 1.13, when a lawyer knows or should know that the organization may be substantially injured (as the United States has, in fact, been harmed—reputationally—all over the world) by tortious or illegal conduct that might (and here would) be imputed to the organization, the lawyer must, at a minimum, seek to have the client reconsider the matter. Second, when a lawyer renders legal advice, there is a professional obligation of candor to the client. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2007). The lawyer's role is not merely to concoct creative, or aggressive—to say nothing of fanciful—legal arguments, and not simply to tell the client what the client wants to hear, but to provide the lawyer's best and most objective assessment of what the law is, and what the law requires or allows. Third, lawyers are not ostriches; they cannot simply ignore what their clients are going to do with the legal advice. Notably, lawyers can also offer moral advice; Rule 2.1 specifically provides that "[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." Fourth, the lawyer has an obligation to explain the law adequately to the client, in order that the client can make informed decisions about the representation. *Id.* R. 1.4(b). Where, as here, the lawyer is advising on the extreme end of the spectrum, then the obligation to give candid legal advice requires disclosure to the client

the lawyer should give serious consideration to not rendering the opinion the client is seeking; after all, the Model Rules expressly countenance a lawyer's withdrawal from an engagement where the client "persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal" or "insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement."⁵⁹

Alternatively, if the lawyer is prepared to go forward with the opinion, it must scrupulously advise the client as follows: first, that the advice being offered lies on one end of a spectrum, with the weight of existing authority suggesting a different conclusion;⁶⁰ second, that there is significant risk that the advice would turn out to be "incorrect" or at least at odds with the mainstream of legal thought; third, that a court confronted with the issue might be expected to come out differently;⁶¹ and finally, of the range of risks—legal and reputational—attending the particular course of conduct, along with the suggestion (or remonstrance) that, to abate those risks, prudence might dictate adopting a less extreme legal position or abandoning the idea altogether.

Transactional Practice: Structuring and Documentation

Enron's infamous collapse—a calamity that has added Enron to our cultural vocabulary as emblematic of corporate misconduct and the gaping maw of wanton and abominable greed—was engineered by senior management who were nothing if not a bevy of Holmesian bad men. After Enron transformed itself from an old economy energy business into a new economy trader, it created a corporate culture demanding incessant innovation in the quest to book "earnings." This mindset led to an array of transactions, dizzying in their complexity,⁶² which turned out to be subterfuges concocted for no legitimate business purpose but solely to

that the lawyer's interpretation is, in fact, at the extreme end and not widely shared in the profession. Fifth, to the extent that the lawyers' skills were being used to assist or enable their client's engaging in activity that turns out to be criminal misconduct, that is a violation of Rule 1.2(d).

59. *Id.* R. 1.16(b)(2), (4).

60. An additional option available to the lawyer is to advise the client based on what the lawyer perceives to be the moral considerations. This resonates strongly with Canon 32, which provides that a lawyer "advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law." ABA CANONS OF PROFESSIONAL ETHICS Canon 32 (1908).

61. This certainly happened with respect to the Bush Administration's position on "enemy combatants." *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (holding that military commission's procedures violated the Uniform Code of Military Justice and did not satisfy the Geneva Conventions); *Rasul v. Bush*, 542 U.S. 466 (2004) (ruling that alien "enemy combatants" on Guantanamo are entitled to raise their claims on writs of habeas corpus); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (ruling that U.S. citizens held as "enemy combatants" in military custody are constitutionally entitled to an opportunity to be heard before an independent tribunal).

62. "Every other white collar case in history is arithmetic," one commentator trenchantly observed, but "Enron is calculus." Jeffrey Toobin, *End Run at Enron*, THE NEW YORKER, Oct. 27, 2003, at 48, 50.

“accomplish favorable financial statement results”⁶³ and thereby preserve and perpetuate Enron’s fictitious profitability.⁶⁴ Accompanying this transformation was a corporate culture of overweening hubris, arrogance, and disdain for those who questioned, or did not understand, such transactions.⁶⁵

Experienced transactional lawyers learn to be adept at structuring transactions to achieve client goals, often by manipulating form in order to affect (or, at times, effect) substance. There is no *a priori* problem with such legal work. Indeed, structuring is a fundamental part of the armamentarium of lawyers in tax, corporate, and regulatory practice.⁶⁶

Structuring a transaction to adhere to the letter of the law is not enough, however. The transaction must serve some underlying—and legitimate—business purpose. The challenge lies in detecting those that do so from those that are mere subterfuges for another agenda. How is a lawyer to do this? Transactions that are fraudulent do not come labeled with a skull-and-crossbones. Nor is a complex transactional structure a totem of trickery and deceit.

What is required is the cultivation of both an inner set of mental red flags and the habit of inquiry. It is emphatically not acceptable for a lawyer to presume that the client’s senior executives, its staff working in that line of business, the outside accountants, the investment bankers, or any other professional is responsible for blessing the details of the transaction, and if it’s all right with those people the lawyer need look no further. That ostrich-like mentality gave us the cataclysmic corporate scandals of the past decade. If the lawyer does not understand the business purpose of the transaction, he should ask someone about it; after all, a lawyer who does not understand the transaction is not likely in a position to do a competent job of structuring it or documenting it. Likewise, if there is something that seems odd or out of place in the transaction, the lawyer should make inquiry. By doing so, the

63. Report of the Special Investigative Committee of the Board of Directors of Enron Corp. 4 (2002), available at <http://news.findlaw.com/hdocs/docs/enron/sicreport> (last visited Nov. 1, 2007).

64. Notably, a number of Enron employees involved in these shams and subterfuges improperly received significant financial benefits from the transactions that gave rise to mammoth losses. CFO Andrew Fastow personally pocketed more than \$30 million, one of his subordinates, Michael Kopper, at least \$10 million, two other employees \$1 million each, and still two more by amounts believed to have been at least in six figures. *Id.* at 3-4. Even an in-house lawyer, Kristina Mordaunt, is said to have accepted interests in one of the related-party investments that enriched Fastow. *Id.* at 27.

65.

If you asked a question that [CEO Jeffrey Skilling] didn’t want to answer, he would dump a ton of data on you. But he didn’t answer. If you were brave and said you still didn’t get it, he would turn on you. “Well, it’s so obvious,” he’d say. “How can you not get it?” So the analysts and investors would pretend to get it even when they didn’t.

BETHANY MCLEAN & PETER ELKIND, *THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON* 233 (2003).

66. Indeed, creative use of these skills is the bread and butter of corporate tax and M&A practice. Elsewhere I have described a somewhat unconventional, but ethically appropriate, example of structuring in the regulatory context. See Fisher, *supra* note 12, at 1137-1141.

lawyer is simultaneously fulfilling the professional obligation of competence and gathering the facts and perceptions necessary to make ethical judgments.

This sounds like a simple enough recipe, and in fact it is. Its efficacy can be illustrated by any of the myriad, often overly complex, transactions that overstated Enron's revenues and hid its true financial condition. Explaining such transactions is, however, itself a complex undertaking, so I beg the reader's indulgence.

Many of Enron's financial assets took the form of ownership interests in various operating entities, many of which were in the energy and telecommunications industries. In a great many transactions, Enron used prevailing accounting standards (particularly Financial Accounting Standard ("FAS") 140)⁶⁷ to convert these assets into an income stream that was, in substance, a loan secured by the pledge of the assets but, in form, a sale of the assets. Frequently, Enron⁶⁸ transferred the assets to a special purpose entity (SPE) or a joint venture established with fictitious "outside" investments that were not, in truth, independent from Enron and did not place the invested funds at risk. Such transactions deceived Enron's creditors and the market by utilizing overly complex structures featuring multiple SPEs or joint ventures, transfers of assets or ownership interests, and unusual, often extravagant, forms of financing; all relied on an established financial institution to provide funding and used a series of complex fund transfers. None of the transactions, however, appeared to have any business purpose other than enabling Enron to pursue deceptive accounting and tax stratagems and directly or indirectly⁶⁹ inflate earnings.

For the transfer of assets to be treated for accounting purposes as a sale, however, Enron, as transferor, had to be seen as relinquishing control of the assets. There were three prerequisites to accomplishing this accounting legerdemain: (1) the assets had to be "legally isolated" from Enron,⁷⁰ as evidenced by an opinion of counsel known as a "true sale" opinion;⁷¹ (2) a transferee entity (or holders of ownership interests therein) obtained the right to pledge or exchange its interest in the assets; and (3) Enron had no right to repurchase or redeem the assets. To implement the "legal isolation" requirement, Enron's outside auditors, the late but unlamented international accounting firm Arthur Andersen, established guidelines for capitalizing SPEs and joint ventures. Under these guidelines, in a 50-50 joint investment involving two parties (one of which would be Enron, directly or

67. Fin. Accounting Standards Bd., Accounting for Transfers and Servicing of Financial Assets and Extinguishments of Liabilities, Statement of Financial Accounting Standards No. 140 (2000).

68. In this discussion, references to Enron acting in the capacity as owner/transferor of financial assets includes Enron acting directly or indirectly through one or more controlled intermediaries (*e.g.*, majority-owned subsidiaries, controlled partnerships, trusts, etc.).

69. For example, one indirect method of earnings inflation would be to concoct methods of deceptively reducing tax liabilities.

70. The significance is that if Enron were to declare bankruptcy, the assets could not be treated as part of its estate and would therefore be unavailable to satisfy the claims of Enron's creditors. To the extent that the transaction was a sham, this perpetrated a fraud on the creditors.

71. The opinion is, in essence, a confirmation to the outside world that the transaction will be treated as a sale rather than as a loan under applicable state law.

indirectly), the ratio of the two investments could not exceed 4:1 in order to remain unconsolidated on Enron's financial statements; hence the minimum equity investment for the non-Enron investor was 20%. In addition, Andersen's guidelines mandated that the minority (*i.e.*, non-Enron) investor hold at least 3% of the total equity with capital that is totally at risk.⁷²

To illustrate an application of contextual ethical reasoning in transactional work, let us consider one of these convoluted arrangements, referred to by the Enron Bankruptcy Examiner, Neal Batson, under the rubric of "Forest Product Transactions"⁷³ and referred to herein as "Project Sundance." The essential structure of the transaction is complex, and the following synopsis of its key elements can be supplemented by referring to the diagram supplied below (which the reader may be astonished to learn is actually somewhat simplified) as a visual aid.

Project Sundance was the third in a sequence of transactions, the first two of which (Fishtail and Bacchus)⁷⁴ were short-term, while Sundance Industrial Partners ("Sundance") was designed to be long-term. All were fabricated to help Enron monetize its pulp and paper assets by moving them off the balance sheet and recognizing "income" and cash flow prior to the end of the fiscal year.

Through two wholly-owned subsidiaries, Enron Industrial Markets (EIM) and Enron North America (ENA),⁷⁵ Enron held interests in paper mills in New Jersey and Quebec, timberland in Maine, and trading contracts for various forest products.⁷⁶ Enron sought to exploit these assets by restructuring them so as to avoid

72. In connection with the Fishtail transaction (see below), for example, these guidelines were discussed in a December 2000 Andersen memorandum. See U.S. SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, STAFF REPORT ON FISHTAIL, BACCHUS, SUNDANCE, AND SLAPSHOT: FOUR ENRON TRANSACTIONS FUNDED AND FACILITATED BY U.S. FINANCIAL INSTITUTIONS 6 (Dec. 11, 2002) [hereinafter SENATE STAFF REPORT], available at http://hsgac.sen.gov/_files/121102report.pdf (last visited Dec. 1, 2007).

73. See Second Interim Report of Neal Batson, Court-Appointed Examiner, at 95-102, *In re Enron Corp.*, No. 01-16034 (bankr. S.D.N.Y. Jan. 21, 2003) [hereinafter Batson Second Report], available at http://www.enron.com/media/2nd_Examiners_Report.pdf (last visited Dec. 1, 2007). The Forest Product Transactions constituted a sequence of four deals in 2000-2001 through which, the Examiner found, Enron (i) recorded approximately \$132 million of income from gain on sales of assets (\$112 million in 2000, \$20 million from Project Sundance alone in 2001) that should not have been so recorded; (ii) received cash flow from financings of \$208 million at year-end 2000, \$200 million of which was erroneously recorded as cash flow from operating activities; (iii) failed to reflect \$375 million of debt in its June 30, 2001 balance sheet; and (iv) sought to realize between \$100-\$150 million of income tax savings in Canada in a transaction that Enron's special tax counsel advised would be challenged as a tax avoidance scheme. *Id.* at 95-96.

74. These are Enron's names. Other nomenclature was often used by parties participating in these transactions. To JPMorgan Chase, for example, Fishtail was known as "Grinch." SENATE STAFF REPORT, *supra* note 72, at 4, n.3.

75. Both of these subsidiaries' financial statements were consolidated with Enron's.

76. The trading contracts were held by Fishtail LLC ("Fishtail"), itself a complex joint venture, largely financed by JPMorgan Chase, in which Enron (acting through ENA), LJM2 Co-Investment LP, a Delaware limited partnership (which operated more like a private equity fund and dealt exclusively with Enron) formed and managed by Enron's CFO, Andrew Fastow ("LJM2"),

consolidation on its financial statements. Sundance was created with (i) a contribution from its general partner, EIM, of the Quebec paper mill and the Maine timberland for a 0.01% economic interest; (ii) a contribution by Class A limited partner ENA of the New Jersey paper mill and control over the trading contracts through the Class A interest in Fishtail, in exchange for a 79.99% economic interest; and (iii) a \$208.5 million cash contribution from Class C limited partner Enron.⁷⁷ Sundance used that cash to purchase Caymus Trust's⁷⁸ Class B interest in Sonoma, thereby giving Sundance control of the 99.99% economic interest in Sonoma (and, with that, control of Sonoma's 79.99% economic interest in Fishtail and the lucrative trading contracts). The final piece of the Sundance ownership pie was sliced for Citigroup, acting through its affiliate Salomon Holding, which became a Class B limited partner with a 20% economic interest.

That explains all the boxes and ovals in the diagram and the initial ownership interests in Sundance. Now, however, some real chicanery leading to palpable ethical lapses begins.

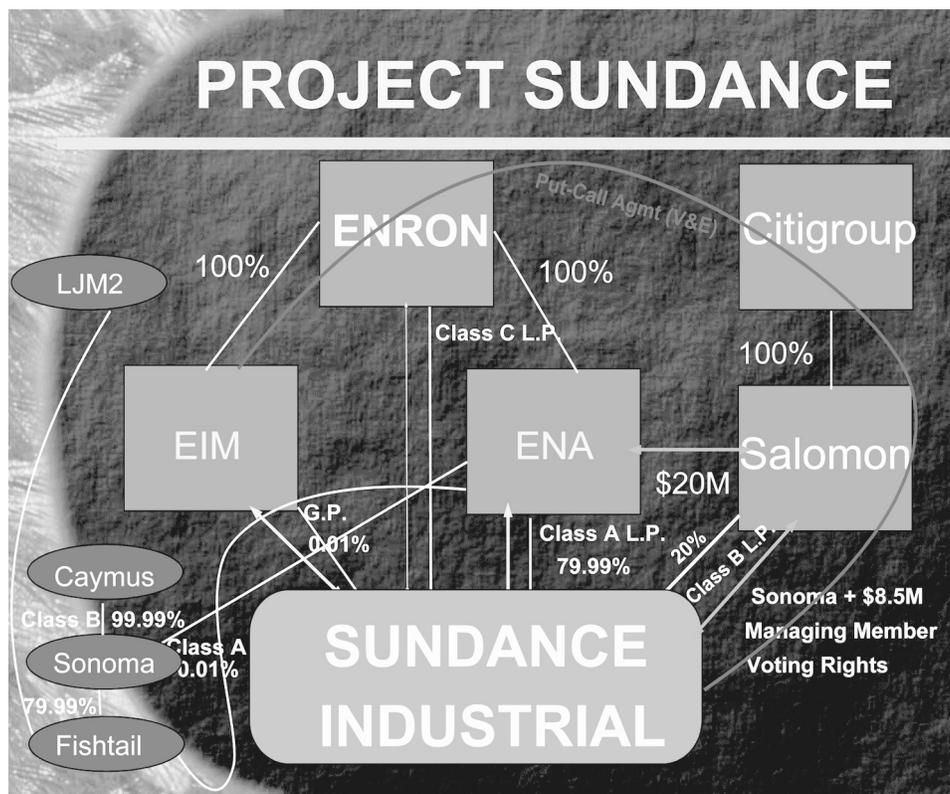
For a price of \$20 million, Citigroup, through Salomon, purchased from ENA its Class A interest in Sonoma and then immediately contributed that interest, along with another \$8.5 million,⁷⁹ to the capital of Sundance, along with a Citigroup

acting indirectly through an SPE called LJM2-Ampato LLC ("Ampato"), and another SPE, Sonoma LLC ("Sonoma"), held the ownership interests. Fishtail's financial statements were not consolidated with Enron's. To add further layers of complexity, LJM2 and Ampato formed an SPE known as Annapurna LLC, which owned 50% of Fishtail's voting interests while ENA held the other 50%; Sonoma was itself owned by two parties, ENA (with a Class A interest entitling it to 0.01% of the economic proceeds), and Caymus Trust (with a Class B interest entitling it to 99.99% of the economic proceeds). *See id.* at 4-5.

77. All told, then, contributions to Sundance's capital from Enron sources totaled approximately \$750 million. *Id.* at 19.

78. In Project Bacchus, Enron had transferred substantially all its economic interest in Fishtail (represented by Class C Fishtail equity) to the SPE Sonoma in exchange for \$200 million in cash. That \$200 million came initially from Sonoma's sale of its 99.99% economic interest to another SPE named Caymus Trust, which was organized by Citibank and funded with \$6 million of ersatz "equity" and \$194 million of debt. "Enron guaranteed Caymus's obligation to repay Citi by entering into a Total Return Swap with Caymus. Enron treated the Class C Fishtail transfer as a sale to Sonoma and recorded income equal to the \$112 million in gain Enron believed existed in the trading business." Batson Second Report, *supra* note 73, at 98-99.

79. Sundance used this \$8.5 million to purchase Annapurna's Class B 20% economic interest in Fishtail, which was then upstreamed to LJM2, thereby facilitating the latter's recoupment of its \$8 million investment in Annapurna and, in combination with an earlier \$350,000 fee, yielded LJM2 (*i.e.*, Fastow) a 15% return on its overall Fishtail investment. SENATE STAFF REPORT, *supra* note 72, at 20, n.58. Sundance also used the \$208.5 million cash contribution from Enron to purchase Enron's former Fishtail interests from Caymus, which then used most of those funds to repay the \$194 million loan from Citigroup and redeem its \$6 million "investment" in the earlier Bacchus transaction, thereby eliminating any remaining risk to Citigroup from the Bacchus deal. "In essence, then, six months after receiving \$200 million from the Caymus Trust [in the Bacchus deal]—all of which had been financed by Citigroup—and using the money to book cash flow and earnings on its 2000 financial statements, Enron returned \$200 million to Citigroup via... [Project Sundance]." *Id.* at 21.



“unfunded capital commitment” of \$160 million. This amounted to an ostensible contribution of \$188.5 million in assets to Sundance,⁸⁰ but it turned out to be all smoke and mirrors. First, the Sundance partnership agreement required Sundance to maintain, in a segregated account, \$28.5 million (the amount of Citigroup funds purportedly “at risk”) “in Enron notes or high quality, liquid financial instruments, to which Citigroup was given preferred access.”⁸¹ Second, the \$160 million unfunded capital commitment could not be drawn upon unless and until Sundance should have lost all of Enron’s \$750 million investment and the \$28.5 million in the segregated account had been cashed in.⁸² Third, Citigroup could pull out at any time, because the partnership agreement gave Salomon the power, at its discretion,

Moreover, an additional \$1.5 million went to Citigroup as compensation for early repayment of the \$194 million loan. *Id.*

80. This sum, representing a 20% capital contribution, satisfied the 4:1 ratio, and the \$28.5 million in cash and stock satisfied the 3% capital at risk, in each case pursuant to Arthur Andersen’s guidelines (so that Sundance would not be consolidated with Enron). *Id.* at 20, n.60.

81. *Id.* at 21.

82. *Id.* at 21-22.

to establish a four-person Sundance board of directors on which Salomon would control two seats, and further provided that a “deadlock” on the board would be an event of dissolution of the partnership.⁸³ Hence, Citi/Salomon could force dissolution of Sundance long before any of Citi’s funds were truly “at risk.” To cap things off, Citi’s internal documents demonstrate that the so-called equity investment in the Sundance partnership was actually structured as debt in both form and substance.⁸⁴

What, then, were the ethical obligations of Citigroup’s lawyers? To approach this question, one must ask what an objective lawyer representing Citigroup could plausibly think was the business purpose of this transaction. Again, contextual ethical reasoning supplies the key. The net effect of the transaction was the same as if ENA, rather than “selling” its Class A Sonoma interest to Salomon, had contributed it directly to Sundance. The only difference is that ENA would not then have been able to book a \$20 million gain from the “sale.”⁸⁵ While a severely limited perspective of their own client’s point of view would provide the assurance of substantial fees⁸⁶ and adequate protection for the funds of Citigroup and Salomon, the question remained: what was in it for Enron? A little more reflection would have yielded the answer: Citi was lending its money, along with its reputation for financial probity, to assist one of its customers, Enron, in “cooking the books” and defrauding the market. In this instance, the customer, not the client, was the Holmesian bad man.

Apart from obvious ethical issues implicit in assisting or aiding and abetting Enron’s massive fraud, Citi’s lawyers failed to protect their own client’s interests. This failure has now come home to roost, as Citigroup faces damage claims of a staggering \$18 billion⁸⁷ by Enron Creditors Recovery Corp., the entity winding up Enron’s affairs.⁸⁸ At a time when Citigroup has posted the largest loss in its history

83. *Id.* at 21 & n.64.

84. *Id.* at 22 & nn. 68-70.

85. In fact, as the transaction has originally been structured, ENA was to contribute Sonoma’s Class A interest to Sundance directly. A month before the anticipated closing, however, Enron advised its outside counsel, Vinson & Elkins, that the value of the trading assets represented by that interest had increased by \$20 million since the trading activity had been moved off Enron’s books into an unconsolidated subsidiary. Enron now wished to recognize that profit on its financial statements by selling to Salomon an interest that represented the increase in value. Salomon would then contribute that interest to Sundance.

86. Citi received an upfront fee of \$725,000, another \$1.1 million return on its \$28.5 million “investment” in Sundance, and additional compensation of \$1.5 million when Project Sundance facilitated prepayment of the \$194 million loan to Bacchus. SENATE STAFF REPORT, *supra* note 72, at 25.

87. Of course, these are not all related to Project Sundance. Citigroup, like some other banks, was involved in a number of shady transactions with Enron, but is the only bank that has not settled the claims against it.

88. The case, in which allegations have been made that Citigroup and its affiliates knowingly assisted Enron’s insider coterie of Holmesian bad men in manipulating and misstating Enron’s financial

arising from the subprime imbroglio, \$9.83 billion in the fourth quarter of 2007,⁸⁹ the prospect of a damage award of nearly twice that magnitude is, to say the least, disquieting.

How did Enron's lead counsel, Vinson & Elkins (V&E), fare with their ethical obligations concerning Project Sundance? Most telling in this regard is the "put-call" agreement, which is represented in the diagram by the long curved line starting in EIM and moving northeast through Enron, then curving down through Citigroup and Salomon, and ending in Sundance.

Since Enron, through EIM, controlled Sundance as its general partner, a true sale opinion was necessary with respect to the Sonoma Class A interest. The V&E lawyers understood that a weak link in the transaction, in terms of isolating the Class A interest from Enron, was insufficient evidence of Salomon's "control" over that asset. In other words, Salomon's immediate transfer of the interest to an affiliate of the seller threatened satisfaction of the desired legal conclusion.

One might pause here and realize that V&E took a purely instrumentalist approach to Project Sundance. Not once did they question the business purpose to the transaction. They took it for granted that lawyers enjoy the flexibility to structure transactions to meet their clients' business objectives, without realizing that such an approach begs the question of the legitimacy or lawfulness of those objectives. Perhaps V&E relied on the fact that Andersen was prepared to bless the accounting treatment for the transaction. If so, they overlooked an important point. Andersen's signing off on the accounting treatment depended on the rendering of a true sale opinion; a lawyer furnishing that opinion was not simply papering over a pre-established accounting treatment but was actually reaching a legal conclusion that was independent of that accounting treatment and upon which that treatment was conditioned.

To overcome this control problem, strengthen the impression that Salomon retained the benefits and risks of owning the Sonoma Class A interest, and give the lawyers a comfort level with respect to issuing the true sale opinion, V&E proposed inclusion of the "put-call" agreement in the overall transaction. Pursuant to that agreement, for a period of six months Salomon would retain the right to call the Class A interest (*i.e.*, require Sundance to sell it back), and Sundance (acting, of course, through its general partner, EIM) would have the right to put

condition, is pending in U.S. Bankruptcy Court in the Southern District of New York. *In re Enron Corp.*, Case No. 01-16034 (AJG) (bankr., S.D.N.Y., 4th amended complaint filed Jan. 10, 2005).

89. See *Today in Business*, N.Y. TIMES, Jan. 26, 2008, at C2 (reporting that Citigroup "would cut about 4,200 jobs and curb year-end bonuses for top executives after \$18.1 billion in write-downs on subprime mortgages and bonds led to a fourth-quarter loss"); *Nearly \$10B Loss Citigroup's Worst*, CHI. TRIB. Jan. 16, 2008, at 3 (reporting this as the worst loss in the bank's 196-year history); Jenny Anderson & Eric Dash, *Citigroup's Big Loss Fuels Anxiety and Depresses Stocks*, N.Y. TIMES, Jan. 16, 2008, at A1 (reporting Citigroup's announcement of a \$9.83 billion loss for the fourth quarter of 2007).

it to Salomon (*i.e.*, require Salomon to buy it back).⁹⁰ There followed weeks of negotiation and brinksmanship between counsel for the two parties, with Salomon endeavoring until the very end to avoid having to sign the put-call agreement or at least to control whether or not the put or call could be exercised. V&E rejected every one of these efforts and simply refused to provide the requisite true sale opinion, without which the deal could not close.

Salomon ultimately caved in, in part perhaps because its counsel appreciated, better than Enron's did, the significance of the "deadlock" provisions of the Sundance partnership agreement.⁹¹ Under the put-call agreement, EIM could exercise the put option on Sundance's behalf only during the period December 5-7, 2001, after giving mandatory notice of the exercise during the period November 19-21, 2001. Although the put-call agreement itself did not give Salomon the power to block its reacquisition of the Sonoma Class A interest, that effect could be achieved by establishing a board for Sundance and creating a deadlock, which Salomon would have ample time to do after receiving notice of exercise of the put but before its actual exercise.

The details of the put-call agreement, and whether Salomon was correct that an end run around it existed, are not important here. What is important is that, the V&E lawyers unmistakably *knew* that the accounting treatment for Project Sundance, and Enron's booking of \$20 million in profits, was untenable. They did not discuss their misgivings with the client. They made no inquiry of the client as to the existence of a legitimate business purpose.⁹² Nor, apparently, did they discuss these issues with Andersen. Instead they bowed to economic self-interest⁹³ and the pressure from Skilling's culture of success⁹⁴ and violated Canon 32's ukase against "deception or betrayal of the public." They concocted a creative, but ultimately makeweight, alteration to the transaction structure, adding yet another layer of complexity to distract people from observing that the emperor had no clothes.

90. If Salomon were to exercise the call, it would have to pay Sundance \$20 million; if Sundance were to exercise the put, Salomon could either pay the \$20 million or *pro tanto* reduce its equity interest in Sundance.

91. See *supra* note 83 and accompanying text.

92. Arguably, Salomon's intransigence with respect to the put-call agreement should all by itself have alerted V&E, if it didn't already know it, that there was no business purpose to the transaction.

93. Enron was V&E's largest client, reportedly contributing some \$27 million in annual fees, representing 7.8% of the firm's business. See, e.g., Otis Bilodeau, *V&E Shoots Back*, LEG. TIMES, Feb. 11, 2002, at 1; John C. Schwartz, *Troubling Questions Ahead for Enron's Law Firm*, N.Y. TIMES, Mar. 12, 2002, at C1, C8; Brenda Sapino Jeffreys, *Vinson & Elkins and Enron Unplugged*, TEX. LAW., Mar. 12, 2002.

94. See text accompanying note 65, *supra*. Cf. ABA Task Force on Corporate Responsibility, Final Report (2003), available at http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf, at 14-15 (last visited Dec. 7, 2007) ("The competition to acquire and keep client business, or the desire to advance within the corporate executive structure, may induce lawyers to seek to please the corporate officials with whom they deal rather than to focus on the long term interest of their client, the corporation.").

We all know the societal damage caused by the series of sham transactions, concocted by Holmesian bad men and structured and documented by Enron's lawyers, that artificially and deceptively propped up Enron's share price over an extended period of time.⁹⁵ There was damage to the lawyers as well—damage that they were not easily able to evade with the usual tools of opinion practice. When issuing its true sale opinion, V&E made the usual disclaimers and simplifying assumptions intended to minimize its liability. First, the firm assumed the key fact—that each party had a valid business purpose for entering into the transaction.⁹⁶ Then came the disclaimers: “We wish to point out that we have not made any investigation or inquiry of any Party or of the books and records of any Party. Rather, we have relied on officer's certificates and representations in the Transaction Documents as to such factual matters as we have deemed appropriate for the purposes of this opinion.”⁹⁷ Notwithstanding this attempt at cover, the Enron Bankruptcy Examiner viewed in tandem the eleventh hour inclusion of the “sale” of the Sonoma Class A interest, Salomon's persistent efforts to extinguish any risk of ownership thereof, and the difficulty that Vinson & Elkins had in negotiating the put-call agreement; taken together, he concluded, these facts belie that either Salomon or Enron had any true business purpose in Project Sundance. In fact, the only purpose that Vinson & Elkins knew of from Enron's perspective was to recognize the \$20 million gain.⁹⁸ He also concluded, based on the complexity of the transaction and its documentation, that a fact finder could well determine that V&E was not acting as a mere scrivener and that it was liable for malpractice and for aiding and abetting Enron officers' breach of fiduciary duties.⁹⁹

95. As Enron's share price fell from a high of nearly ninety dollars to around twenty-five cents, its 401(k) plan—in which 15,000 employees participated—lost 1.3 billion dollars. Louis Uchitelle, *The Rich Are Different: They Know When to Leave*, N.Y. TIMES, Jan. 20, 2002, 4, at 1. See also PATRICK J. PURCELL, THE ENRON BANKRUPTCY AND EMPLOYER STOCK IN RETIREMENT PLANS, at 1 (CRS Report for Congress) (Jan. 22, 2002), available at http://www.americanbenefitscouncil.org/documents/rs_21115.pdf (last visited Dec. 12, 2003) (Enron stock traded at over \$80/share in January 2001 and less than 70¢/share in January 2002); *id.* at 3 (62% of Enron 401(k) plan's assets as of Dec. 31, 2000 were in Enron stock). In addition, while the damage occasioned by these scandals to the integrity of the markets may well be incalculable, not so the probable loss to shareholder value: Indeed, one year after the Enron debacle had surfaced, the stock market, already depressed by the bursting of the “hi-tech bubble,” had lost an additional \$7 trillion in value. Some might argue that the market will eventually recover and this loss is transient; perhaps that is so, for an artificial construct vaguely referred to as “the market,” but the losses are certainly not transient to the millions of investors whose “nest eggs” were wiped out.

96. Final Report of Neal Batson, Court-Appointed Examiner, app. C, at 80-81, *In re Enron Corp.*, No. 01-16034 (bankr. S.D.N.Y. Nov. 24, 2003) (Role of Enron's Attorneys), available at <http://elawforenron.com> (last visited Feb. 20, 2007).

97. *Id.* at 81 n.305.

98. *Id.* at 81.

99. *Id.* at 182-183.

Opinion Practice: Form over Substance, Factual Inquiry, Privilege, and Fees

A tax shelter is nothing more than a tax-advantaged investment making use of benefits and tax preferences Congress has provided in the Internal Revenue Code. In addition to enjoying a return on the investment, the purchaser may benefit from a deduction or tax credit that serves to reduce or “shelter” taxable income from other sources. There is nothing intrinsically wrong or unethical about either purchasing or marketing a tax shelter or furnishing counseling or other legal services in connection with such shelters, because there is no legal or ethical obligation to pay more in taxes than the law requires. Nevertheless, as with other investment vehicles, there is a potential for abuse.

Back in the 1970’s and early 1980’s, to combat certain such abuses,¹⁰⁰ the Treasury Department proposed amendments to its Circular 230,¹⁰¹ which governed tax practice before the Internal Revenue Service (IRS). The idea was to set forth stricter standards of conduct for attorneys providing tax shelter opinions that were intended for distribution to investors (most, if not all, of whom were not the attorneys’ clients) as part of the offering materials.¹⁰²

After some back and forth with the tax bar, which initially opposed the breadth of the proposed amendments, the ABA Standing Committee on Ethics and Professional Responsibility issued a formal opinion¹⁰³ declaring that an attorney providing a false opinion¹⁰⁴ was violating the disciplinary rules of what was then the prevailing

100. With the advent of market manipulations by the OPEC oil cartel, double-digit inflation, soaring interest rates, and high marginal tax rates, demand for tax-sheltered investments skyrocketed, and unscrupulous promoters saw an opportunity to sell investments that were not genuinely intended to exploit areas of business (*e.g.*, energy) upon which Congress had, for policy reasons, decided to confer tax preferences, and that, in fact, had no business purpose or investment rationale *other than* tax avoidance. Examples included land flips and other transfers of property at artificially inflated prices, passing off nonrecourse debt as risk debt, sham trading to create losses, and allocating income and tax deductions in limited partnerships in a manner totally at odds with economic reality.

101. See 31 C.F.R. § 10.0 *et seq.* The scope of Circular 230 encompasses a range of matters, including eligibility for admission to practice, standards of practice, and disciplinary measures.

102. Actually, the Treasury originally endeavored to persuade the bar to adopt appropriate guidance. See Robert Mundheim, *Remarks on Standards for Tax Attorneys*, 15 Daily Tax Rep. J-1 (Jan. 22, 1980), *reprinted in* Bernard Wolfman & James P. Holden, *Ethical Problems in Federal Tax Practice* 175 (2d ed. 1985). When those efforts at moral suasion came to nought, Treasury resorted to rattling its sabers by threatening regulation, and, when the bar was slow to act, actually promulgated amendments to Circular 230. See Dept. of the Treasury, *Tax Shelters; Practice Before the Internal Revenue Service*, 45 Fed. Reg. 58,594 (1980).

103. ABA Comm. on Ethics and Professional Responsibility, *Formal Op. 346* (1981). After collecting comments, the Committee issued a revised version of *Formal Opinion 346* in January 1982. *Id.* (rev. 1982), *reprinted in* 68 A.B.A. J. 471 (1982).

104. A “false opinion” is defined in *Formal Op. 346* as an opinion in which the lawyer accepts as true facts provided by the promoter when the lawyer should know that further inquiry would disclose that the facts are untrue.

model of ethical regulation, the *Model Code of Professional Responsibility*¹⁰⁵ and establishing eight aspirational (*i.e.*, derived from the Model Code's Ethical Considerations) principles as guidance¹⁰⁶ for lawyers issuing tax shelter opinions.¹⁰⁷ The guidance was indeed well conceived and fairly comprehensive, and was drafted with due regard to what ought to be the lawyer's obligations when called upon to issue a tax shelter opinion. For the most part, however, it had no teeth, and served only as a guidepost for state disciplinary authorities, who would only by accident take uniform positions (assuming they took any positions at all) on the subjects covered by Formal Opinion 346.

For these reasons, and others,¹⁰⁸ the Treasury Department, though it had been tempted to withdraw its own tax shelter rules in favor of Formal Opinion 346, ultimately determined to issue a further revamped Circular 230.¹⁰⁹ Effective in

105. American Bar Ass'n, Model Code of Professional Responsibility [hereinafter "Model Code"] (1969). Key Model Code provisions on which Formal Op. 46 was predicated included DR 7-102 (duty to represent client within bounds of the law); DR 1-102(A)(4) (conduct that a lawyer knows to be dishonest, deceitful or fraudulent); DR 7-102(A)(5) (knowing misstatements of fact and law); DR 7-102(A)(7) (counseling or assisting the offeror in conduct the lawyer knows to be illegal or fraudulent); and possibly DR 7-102(A)(3) (concealment of matters that the lawyer is required by law to reveal).

106. These principles provided that the lawyer should (1) establish at the outset a relationship with the client under which the lawyer will have full access to all relevant facts; (2) be satisfied that the material facts are accurately and completely stated in the offering materials and that representations as to future activities are reasonable and complete (*i.e.*, no "assumed facts" opinions); (3) relate the law to the actual facts of the offering, (*i.e.*, no *purely hypothetical opinions*); (4) inquire to ensure that the promoter has received competent advice on any relevant non-tax legal issues; (5) take reasonable steps to assure that all material tax issues have been considered, and should address issues as to which there is a reasonable possibility of challenge by the IRS, whether or not those issues are also considered by nonlawyer tax professionals (*i.e.*, no partial opinions); (6) where possible, provide an opinion as to the likely outcome on the merits of each material tax issue addressed in the offering materials in the event of an IRS challenge (with an explanation of the likely IRS position as deduced from prior revenue rulings or court decisions), or else explain why it is not possible to express such an opinion; (7) include in the opinion an overall evaluation of the extent to which the aggregate tax benefits are likely to be realized as contemplated by the offering materials, or if that is not possible, explain why not; and (8) review the offering materials to ensure that the nature and extent of the provided tax opinion are properly represented. Formal Op. 346, 68 A.B.A. J. at 473-74. The Ethical Considerations incorporated into these guidelines included EC 1-5, EC 6-1, EC 6-4, EC 6-5, EC 7-1, EC 7-3, EC 7-5, EC 7-6, EC 7-8, EC 7-10, EC 7-22, and EC 7-25.

107. For purposes of Formal Op. 346, a tax shelter opinion constitutes tax advice (including advice on the tax aspects or risks of the offering materials, whether or not a separate opinion is issued) that is referred to in offering materials or in sales promotion activities and that is directed to persons who are not clients of the lawyer providing the advice.

108. Not only considerations of nationwide uniformity in federal tax practice, but also the simple fact that tax is a multi-profession practice whose practitioners encompass not only lawyers but a variety of nonlawyers—including accountants (CPAs are automatically admitted to practice before the IRS, *see* 31 C.F.R. § 10.3(b)) and enrolled agents (*e.g.*, enrolled actuaries, *see id.* § 10.3(d))—who of course are not bound by Formal Opinion 346, tilt the scale in favor of federal standards.

109. *See* Dept of the Treasury, *Amendments to Circular 230*, 49 Fed. Reg. 6719 (1984) (codified at 31 C.F.R. pt. 10).

mid-1984, the revised Circular 230 incorporated many of the standards in Formal Opinion 346 but also went its own way on certain (usually technical) points. The major difference, of course, was that Circular 230 represented positive law, enforceable by sanctions as severe as suspension or disbarment from practice before the IRS, as opposed to the soft-pedaled standards of an ABA ethics opinion the majority of which were couched in aspirational terms (and thus did not necessarily subject lawyers to disciplinary action for violation thereof).

So matters stood for awhile, until the bull market of the “Dot Com” 1990’s, when a second wave of abusive¹¹⁰ tax shelters began to be peddled aggressively by various tax professionals, including accounting firms, investment banks, and law firms. The marketing efforts were relatively easy, successful, and highly remunerative, because of increased demand for paper losses to offset the enormous amounts of paper income that were being generated.¹¹¹ Also, it was well worth the gamble. The IRS lacked adequate resources to audit more than a small fraction of returns (mostly corporate returns) featuring tax sheltered investments. If an enforcement action were actually brought, the penalty of 20% was not high enough to have a substantial deterrent effect.

More to the point, penalties rarely were assessed, because the shelters were marketed with opinion letters from lawyers that served to abate penalties. Under Section 6664(c)¹¹² of the Internal Revenue Code, even substantial underpayment of taxes due to investments in tax shelters were not subject to a penalty if the taxpayer could meet the statutory “reasonable cause and good faith” exception. As interpreted by the Treasury’s regulations, reasonable cause existed (and the penalty was abated) if the taxpayer reasonably relied in good faith on an opinion, based on a professional tax adviser’s analysis of the pertinent facts and authorities, that unambiguously concluded that there was a “greater than 50-percent likelihood that the tax treatment of the item will be upheld” if challenged.¹¹³

Typically, these 1990’s tax shelters were sold for fees calculated as a percentage of the amount of tax saved. This created incentives for clever tax lawyers and

110. In general, “abusive” tax shelters take advantage of a number of factors, including the limited audit resources of the IRS, the high cost of audits relative to the anticipated return, and the fact that ordinary investors could be inoculated against severe tax penalties because they reasonably relied on legal opinions rendered in connection with the investment offering and could not, therefore, be proved by the IRS to have acted recklessly or fraudulently (or, indeed, even negligently).

111. See, e.g., Janet Novak & Laura Saunders, *The Hustling of X Rated Tax Shelters*, *Forbes*, Dec. 14, 1998, at 198; Joseph Bankman, *The New Market for Tax Shelters*, 83 *Tax Notes* 1775 (1999).

112. I.R.C. § 6664(c).

113. Treas. Reg. § 1.6664-4 (as in effect until 2003). Since then, Congress intervened to change the landscape drastically with the American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418 (2004). This statute, one of the most significant pieces of tax legislation since the comprehensive revamping of the Internal Revenue Code in 1986, specifically targeted abusive tax shelters by increasing penalties and making it more difficult for a taxpayer to qualify for abatement thereof because of reliance on professional advice. Much of the discussion in this section, therefore, relates to lawyer conduct under the pre-American Jobs Creation Act regime.

other tax practitioners to develop a good shelter template, which could then be sold to hundreds of clients and earn the promoter many millions of dollars. Even lawyers (unlike the many law firm tax partners wooed away by the big accounting firms with the promise of extraordinary compensation) who did not directly participate in the design or promotion of tax shelter products could earn substantial fees by providing the tax opinions that were the antidotes to tax penalties.¹¹⁴

The ethical problems raised by such opinion rendering revolve around both the profit motive to issue such opinions without any independent investigation or fact gathering, and the “cookie-cutter” nature of the practice. A Senate investigation of tax shelters jointly promoted by KPMG and Sidley Austin Brown & Wood described the following scenario:

... Sidley Austin Brown & Wood and KPMG actually exchanged copies of their respective draft opinion letters and conducted a detailed “side-by-side” review “to make sure we each cover everything the other has.” The result was two, allegedly independent opinion letters containing numerous, virtually identical paragraphs.

KPMG used the availability of the second opinion letter from Sidley Austin Brown & Wood as a marketing tool to increase sales of its tax products, telling clients that having this second letter would help protect them from accuracy-related penalties if the IRS were later to invalidate a tax product. Many clients were apparently swayed by this and sought an opinion letter from the law firm. Evidence obtained by the Subcommittee indicates that the opinions provided by the law firm were, like KPMG’s opinion letters, virtually identical in content and reflected little, if any, client interaction or legal advice. In some cases, KPMG arranged to obtain a client’s opinion letter directly from the law firm and delivered it to the client, apparently without the client’s ever speaking to any Sidley Austin Brown & Wood lawyer. . . . This type of evidence suggests that the law firm’s focus was not on providing individual legal advice to clients, but on churning out boilerplate opinion letters for a fee.¹¹⁵

114. During the heyday of these shelters, fees that tax lawyers could command for these opinion letters ran into the hundreds of thousands of dollars and occasionally exceeded \$1 million. Novak & Saunders, *supra* note 110, at 198; David Cay Johnston, *Tax Magicians: Sham Shelters for Business Flourish as Scrutiny Fades*, N.Y. Times, Dec. 19, 2000, at A1. Here is an example: Merrill Lynch saved AlliedSignal \$180 million by inventing a way for AlliedSignal to escape taxes it owed the federal government on the sale of an oil business. “The scheme worked this way: the company transferred the taxable profit on the sale to a newly created partnership with a foreign company, which turned around and returned the same amount to AlliedSignal in a way that made it no longer count as taxable profits. For their efforts, Merrill and its associates got a cut of the savings—\$25 million, or more than 13 cents on every dollar rescued from the government.” *Id.*

115. *U.S. Tax Shelter Industry: The Role of Accountants, Lawyers, and Financial Professionals; Four KPMG Case Studies: FLIP, OPIS, BLIPS, and SC2*, Sen. Comm. on Governmental Affairs, Report of Minority Staff of Permanent Subcomm. on Investigations, at 87-88, 108th Cong., 1st Sess.

If the law firm partners responsible for this opinion practice had applied the contextual approach urged here, they would have identified some ethical problems. Legal opinions are, by their very nature, fact-dependent. As early as 1908, the *Canons* admonished, “A lawyer should endeavor to obtain full knowledge of his client’s cause before advising thereon”¹¹⁶ Standard opinion practice is for the opinion to recite the facts on which it relies and the source of those facts. While it is typical for law firms to seek to minimize their liability by circumscribing the scope of their inquiry in rendering legal opinions, making no effort whatsoever to interview the client and ascertain the particular facts of that client’s situation is fraught with peril. For one thing, it calls into question the competence of the legal services being provided.¹¹⁷ For another, it risks rendering an opinion, which may end up being relied on by investors or may ultimately be provided to a government agency, where the facts as represented are untrue or misleading.¹¹⁸

Other problematic conduct uncovered by the Senate investigation included aggressive use of the attorney-client privilege—not at the law firm’s instance but at the instance of KPMG or Deutsche Bank—not merely to shield advice to client A from IRS scrutiny but to shield documents that would link a tax shelter for client A to substantially identical shelters for clients B through Z so that there would be no paper trail for IRS easily to uncover all the shelter transactions.¹¹⁹ Again, let us focus on context. While it is common, and legitimate, for law firms to arrange to cloak accountants and others with attorney-client privilege in order fully to protect the process of client A’s making confidential communications in order to receive legal advice, expanding that cloak to clients B through Z, as described, bears no relation to client A’s confidences and begins to look a lot more like obstruction of justice.¹²⁰

(Nov. 2003) (footnotes omitted) [hereinafter *U.S. Tax Shelter Industry*], available at http://www.senate.gov/~govt-aff/_files/sprt10834tax_shelters.pdf (last visited Feb. 20, 2008).

116. ABA Canons of Professional Ethics Canon 8 (1908).

117. See Model Rules of Prof’l Conduct, R. 1.1 (2007). “Competent handling of a particular matter includes *inquiry into* and analysis of the facts and legal elements of the problem” *Id.*, cmt. 5 (emphasis supplied).

118. See *id.*, R. 4.1(a) (prohibiting a lawyer from knowingly making a false statement to a third person); R. 3.3(a)(1) (prohibiting a lawyer from knowingly making a false statement of fact to a tribunal), R. 1.0(m) (defining tribunal to include administrative agencies). Here, however, the qualifying adverb “knowingly” can save the lawyer from exposure to discipline by the bar, because “knowingly” denotes only actual knowledge. *Id.*, R. 1.0(f). That technicality may be of no avail, however, in proceedings brought by an administrative agency before which the lawyer is licensed to practice (which is part of the Circular 230 regime). Cf. *In re Keating, Muething & Klekamp*, Exchange Act Release No. 34-15982 (July 2, 1979), 1979 WL 186370, in which the SEC, proceeding under its former Rule 2(e) (now recodified as Rule 102(e), 17 C.F.R. § 201.102(e)), alleged that the law firm had prepared for its client a variety of documents and legal opinions and had provided legal advice and a range of legal services in connection with transactions in which the filings made with the SEC contained untrue statements of material facts and material omissions of fact.

119. *U.S. Tax Shelter Industry*, *supra* note 115, at 98-99.

120. Cf. Model Rules of Prof’l Conduct, R. 3.4(a) (2007) (prohibiting a lawyer from unlawfully obstructing another party’s access to evidence).

The cozy, joint marketing relationship between the law firm and accounting firm in these scenarios should also be analyzed from the point of view of potential conflicts of interest. It is only to be expected that some tax shelter clients will fall under IRS scrutiny for understating their tax liability or purchasing an illegal tax shelter. Some of those clients may, under those circumstances, wish to have the law firm that advised on the tax shelter sue the accounting firm that sold it, unaware that an attorney-client relationship may have arisen between the law firm and the accounting firm.

Finally, there is the question of the law firm's fees. Here, resort to contextual ethical reasoning is not even necessary. Fees charged based on a percentage of the projected tax savings (which may ultimately be vitiated after an IRS audit by a statutory notice of deficiency and penalty assessment) seem to violate the proscription against making an agreement for, charging, or collecting an unreasonable fee.¹²¹ After the ground work done in preparing the prototype opinion for a particular tax shelter product (which work, incidentally, may not have been done by the law firm at all but by the accounting firm's in-house lawyers), the law firm continued to charge very substantial fees for each cookie-cutter opinion rendered, even where no new facts or additional legal analysis was involved, no client consultation was undertaken, and the only work to be done involved changing the name of the client on the word processed opinion document.¹²²

Conclusion

The instrumental approach of the Holmesian "bad man" has become a pervasive ideology that, in a world of increasingly cut-throat competition for clients, has ensnared even some of the finest practitioners, who failed to detect the serious ethical problems inherent in being an amoral facilitator of the bad man's schemes. To restore the practice of law from its currently debased status as indistinguishable from the meanest of trades to a learned and ethical profession, in the spirit of the ABA's century-old *Canons of Professional Ethics*, it is incumbent upon practicing lawyers to repudiate the Holmesian bad man's blandishments, apply contextual ethical reasoning to the challenges of everyday law practice, and reclaim their vital role as stewards of the Law.

121. *Id.*, R. 1.5(a).

122. In some instances, fees were collected by the tax shelter promoter and apportioned based on a variety of factors, including who had brought in the client. Such an arrangement violates the proscription against fee-splitting with nonlawyers. *Id.*, R. 5.4(a).